WRITING DECISIONS FOR COMPLEX CASES

District Chief Judge Jennifer Gee (ret'd)

September 11, 2023

National Association of Hearing Officials

Why Do We Write Decisions?

- Explain how we reached the decision
- Persuade the parties the decision is right
- Help the appellate body understand the decision

How Do We Accomplish the Goals?

Write a complete / thorough decision that

- Explains what the dispute is
- Identifies who the parties are
- Communicates our decision
- Explains how we got to our decision

GENERAL TIPS ABOUT DECISIONS

- Know your audience – is the reader an engineer or a grade school dropout?
- Remember you may need to educate an appellate judge.
- Write in plain English.
- Don't leave gaps in your decision.
- Write in the first or third person.
- Use headings and subheadings.

MOST IMPORTANT LESSONS

- Start writing the decision as soon as possible after the hearing
- Right after the hearing make a record of your impressions:
  - Issues to follow up on
  - Credibility factors

HEARING RECORD

What kind of record of the hearing do you get?

- Written transcript
- Audio tape
- Other

CLOSE OF HEARING

Do you get oral closing arguments or written closing briefs?

- Oral closing arguments
- Written closing briefs

GENERAL PREPARATION

- Review the case file
- Make sure the case is ready for decision
- Familiarize yourself with the applicable substantive law and procedural issues

GENERAL PREPARATION

- Put together a checklist of what you need to make a decision
- Know your board or agency's decision protocol or format
- Know your agency or state's citation rules

Each decision is unique!

DECISION REQUIREMENTS

"An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his or her legal reasoning as well as the authorities on which that reasoning rests."
Scott v. Department of Justice, 69 M.S.P.R. 211, 221 (1995)

ESSENTIAL PARTS OF A DECISION

- ❑Basic information
- ❑Introduction
- ❑Procedural background (optional)
- ❑Statement of issues
- ❑Findings of facts
- ❑Discussion or analysis
- ❑Conclusions of law
- ❑Order or recommendation
- ❑Statement of Appeal Rights
- ❑Judge's signature and date

BASIC INFORMATION

- Case caption (w/ names of parties)
- Type of party (Respondent, Appellant, Claimant, Applicant)
- Agency / Board / Commission name
- Date issued / filed
- File or docket number
- Type of decision (recommended, final, initial, etc.)

INTRODUCTION

- Identifies the parties
- Identifies when the case was initiated and who initiated it
- States what the case is about
- States the jurisdictional basis
- Tells the parties the outcome

SAMPLE INTRODUCTION

This case was initiated by Respondent, Best Miracle Corp., on May 5, 2023, who is appealing penalties assessed against it by the U.S. Department of Labor for violations of the overtime provisions of the Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. § 201, *et seq.*

PROCEDURAL BACKGROUND

- Not necessary if it is a simple, single issue case
- Brief summary of the procedural background (how case got to you)
  - Date and location of hearing
  - Who appeared at the hearing
  - What happened to all the exhibits

PROCEDURAL BACKGROUND ITEMS

Possible items to include in procedural background:

- Late hearing request
- Bifurcation ruling
- Unusual delays in case processing
- Parties' agreement to stipulations
- Any claims / issues / affirmative defenses dropped by a party
- Significant motion rulings/sanctions

STATEMENT OF ISSUES

- Roadmap for reader of what will be decided
- Reviewed with parties at start of hearing
- Cross-check for the judge
- Not needed if single issue case already covered in introduction

FINDINGS OF FACT

A finding of fact is a statement of what the judge decides is true.

CONSIDERATIONS WHEN WRITING FINDINGS OF FACT

- Must be understandable
- Should include all findings needed to support the conclusions of law
- Must be supported by the evidence
- Should be complete and specific

CONSIDERATIONS WHEN WRITING FINDINGS OF FACT (CONT'D)

- Should be unambiguous
- Is not a restatement of testimony
- Is not a restatement of the parties' allegations

How do you write your findings of fact?

- In narrative form
- In a numbered format
- Other

What's wrong with this finding of fact?

It appears the septic system failed in August.

a) It suggests uncertainty

b) The date is ambiguous

c) All of the above

Organizing Your Findings of Fact

- Use subheadings
  - By allegations
  - By cause of action
  - By date
  - By injury (in worker's comp cases)
  - By doctor

What is wrong with this finding?

The appellant must have received the letter, since it was mailed to his business address as listed with the Commission.

Better Finding

The letter was mailed to the appellant at his business address as listed with the Commission.

The appellant received the letter.

Published Finding of Fact

Hunter testified for the Department that the industry practice is to have investigative personnel that consist of claims examiners and field investigators whose costs are classified as ULAE and that such standard costs as claims examiners and anti-fraud activities, important as they are, are properly classified as ULAE in industry practice.

Findings of Fact Do's

- Use simple English
- Explain acronyms

Which do you prefer?

a) The insurer argued that the cost of the SIU should have been charged to ALAE.

b) The insurer argued the cost of the Special Investigations Unit ("SIU") should have been charged to Allocated Loss Adjustment Expense ("ALAE").

Findings of Fact Tips

- Use plain English
- Can be organized
  - chronologically
  - by issue
- Use whatever organization is easier to follow and fits the case

Findings of Fact

- Should lay out a complete picture of what the case is about
- Should not include extraneous findings

Basis for the Finding

- Identify the basis for the finding
  - Evidence
  - Transcript

Glenn Simpson Washington, DC August 22, 2017

Page 119

1 Yeah, that kind of thing.
2 Q. I do want to get into some more specific
3 about kind of what stage and what items you may
4 also clarify, but I do want to make sure, if I
5 could have your indulgence, just that we -- well,
6 we can finish up the FBI part on our next busy
7 because it sounds like there's a little more to
8 finishing that. So we have to go. If you'll just
9 give me a moment.
10 Okay. So we'll go ahead and go off the
11 record. It is 2:06.
12 (A short break was had.)
13 MR. SMITH: We'll go back on the record.
14 It's now 2:06.
15 EXAMINATION
16 BY MR. SMITH:
17 Q. Mr. Simpson, do you know Bob Ephiaev,
18 E-P-H-I-A-E-V-E-R-E-V?
19 MR. SMITH: Personally or just does he know
20 about him?
21 MR. SMITH: Personally.
22 BY THE WITNESS:
23 A. No.
24 Q. Do you know Arias, A-R-I-A-S, Ephiaev?
25 A. No.

1-800-FOR-DEPO Alderson Court Reporting www.alderson-reporting.com

Findings of Fact Reminders

Findings of Fact:

- Must be supported by the evidence
- Should not restate the testimony
- Should not restate the allegations
- Must be understandable
- Are not discussion of the evidence

Discussion or Analysis

Where you explain your decision and sell it to the reader

The Discussion / Analysis Section

- Explains
  - Why findings were made
  - How conclusions were reached
  - Credibility determinations

Discussion / Analysis

- Explains how conflicting evidence was handled
- Needs to be a complete explanation
- No conclusory statements

Criticism of a Recommended Decision

In a critical decision, the MSPB said:

"Our review of the record discloses that the recommended decision does not summarize all the evidence on each disputed issue, nor does it explain in detail why the ALJ found the chosen facts more credible than [the Office of Special Counsel's] version of the Facts."

Criticism of Recommended Decision (cont'd)

The MSPB went on to say "Indeed the Board cannot determine from the [recommended decision] whether the ALJ actually considered all the record evidence in reaching his decision and it appears from our review of the record that the ALJ misconstrued some evidence and overlooked or ignored other evidence." *Special Counsel v. Eubanks*, 76 M.S.P.R. 405, 414 (1997)

Appellate Criticism for Incomplete Analysis

In the instant case, the ALJ relied on and accepted Dr. Seidensticker's testimony to find that Claimant reached maximum medical improvement. Dr. Seidensticker's testimony to the effect that nothing precluded Claimant from returning to his former employment was ignored. The ALJ accepted Dr. Brazzone's testimony to support the finding that Claimant was unable to return to his former employment.

Criticism (cont'd)

However, he ignored Dr. Brazzone's testimony that Claimant's condition is not permanent but rather will improve with time. The ALJ gave no explanation for these conflicting findings. In the absence of a sufficient explanation, the Board is unable to perform its review function. Accordingly, the case must be remanded. *Bonner v. Ryan-Walsh Stevedoring Co.,* 15 BRBS 321 (1983).

Criticism to Avoid

"We also find the ALJ improperly discounted certain evidence and failed to explain how she resolved conflicting evidence, making it difficult to evaluate whether substantial evidence supports her findings on contributing factor and Respondent's affirmative defense." *Joe Tocci v. Miky Transport*, ARB Case No. 15-029 (May 18, 2017)

Discussion

The parties have stipulated that the Claimant's relevant date of injury was May 12, 2009, and that his average weekly wage ("AWW") as of that date, if not using the blended rate, was $2376.18. I reject the blended rate and find this to be the Claimant's AWW. [This is the only discussion about AWW. What is wrong with the discussion?]

Discussion from Published Decision

"Conflicting evidence was presented on this issue. In examining the testimony of Ray Dowling, Weldon Wilson, Eric Johnson and the documentary evidence presented, it becomes clear at length that these contracts did serve a legitimate business interest…."

NOTE: The judge failed to include any other discussion about the contracts or evidence

What other discussion is needed?

Discussion (cont'd)

"However, this legitimate business interest was not a legitimate transfer of risk within the meaning of Insurance Code § 922.3. This will result in excluding the $481,000 expense as well as an adjustment of $8,000,000 in the 1988-89 Statement of Surplus."

NOTE: This is the complete discussion.

What additional detail is needed?

Rejection of Employer's Reenactment of Accident

The weights used in the video did not reflect those that the Claimant experienced. The size of the grapple shown in the video was larger than that which struck the Claimant's truck, and the weight of the scrap metal load shown in the video was greater than that which was in the Claimant's truck at the time of his injury.

The Discussion / Analysis Section

Can include:
Comments on the evidence or lack of evidence

Should include:
An explanation about how the parties' contentions were resolved

Suggestions for the Discussion

- Include citations to case and statutory authorities
- Follow the agency citation rules
- Don't include string cites

Discussion Suggestions (cont'd)

- Add a parenthetical if a particular court decision is on point
- Briefly summarize or quote the text of regulations or statutory provisions cited
- Make sure all arguments are addressed

Suggestions for Structure of Analysis Section

Begin the analysis section with a statement of the applicable law and the elements that have to be proven.

Sample - Applicable Law Language

Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing injury to result in a greater disability than would have been caused by the injury alone. (cite omitted)

Applicable Law Sample (cont'd)

To qualify for Section 8(f) relief, an employer must make a three part showing: (i) that the employee had a pre-existing partial disability; (ii) that this partial disability was manifest to the employer; and (iii) that it rendered the second injury more serious than it otherwise would have been… .

Conclusions of Law

- Must be supported by findings of fact
- One is needed for each issue, if there are multiple issues
- Should cite to the applicable regulatory or statutory authority
- Must be explained

Conclusion for the Section 8(f) Example

The Employer is not entitled to Section 8(f) relief because it failed to prove that the Claimant's pre-existing injury was manifest to it.

Which conclusion is better?

a) I conclude that the appellant failed to meet his burden of proof to show he is eligible for waiver of his overpayment.
b) I conclude that the appellant was properly denied a waiver of his overpayment because he had enough liquid assets to repay the overpayment.

Conclusions of Law Recap

Conclusions of Law should:

- Be supported by findings of fact
- Include a very brief summary or paraphrase of any applicable statute, regulation, or rule
- Should be explained

Order or Recommendation

- Disposes of the case and tells the parties the bottom line
- Should be short
- Multiple orders should be stated separately – possibly numbered
- Should be unambiguous

Order or Recommendation (cont'd)

- Should include any necessary deadlines
- Should clearly identify who is to comply with the order
- Suggestion - put the dispositive word in capital letters (GRANTED, DENIED, REVERSED, etc.)

Caution When Drafting the Order

Make sure that you have the authority to take the action that you are ordering

Appeal Rights Should Tell the Parties:

- How to file an appeal
- Where to file an appeal
- When to file an appeal
- Use a specific date if possible

After You Write the Decision

- Double-check your citations
- Spell check the decision for obvious errors

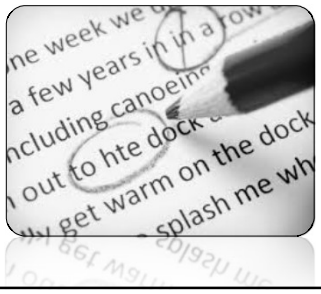
  BUT
- Proofreading is essential

Why We Spell Check

Aoccrdnig to a rscheearcher at Cmabrigde Uinervtisy, it deosn't mttaer in what oredr the ltteers in a wrod are, the olny iprmoetnt tihng is taht the frist and lsat ltteer be at the rghit pclae. The rset can be a total mses and you can sitll raed it wouthit porbelm. Tihs is bcuseae the huamn mnid deos not raed ervey lteter by istlef, but the wrod as a wlohe.

Proofreading

Proof-reading can also help us find potentially embarrassing punctuation errors.



Choose the Sentence

Which sentence do you think the author intended to say?

a) Let's go eat Mother.
b) Let's go eat, Mother.

Why Spellchecking Isn't Enough

Eye halve a spelling chequer
It came with my pea sea
It plainly marques for my revue
Miss steaks eye kin knot sea

Eye strike a key and type a word
And weight for it to say
Weather eye am wrong oar write
It shows me strait a weigh
As soon as a miss steak is maid
It nose bee fore two long
And I can put the error rite
Its rarely ever wrong

Why Spellchecking Isn't Enough (The Rest of the Poem)

Eye have run this poem threw it
I am shore your pleased to no
It's let her perfect in it's weight
My chequer toiled me sew

Proofreading Suggestions

- Ask another judge
- Ask your support staff
- Ask your law clerk
- OR
- Set the decision aside for a while and read it later

We proofread …

- For consistency in expressions, terms, and abbreviations
- To check for ambiguous language
- To avoid embarrassing language
- To avoid embarrassing mistakes

Church Announcements That Pass Spell Checks

- The songfest was hell at the Methodist church on Monday.
- The pastor would appreciate it if the ladies of the congregation would lend him their electric girdles for the pancake breakfast next Sunday.
- This being Easter Sunday, we will ask Mrs. Lewis to come forward and lay an egg on the altar.

After you finish making changes …

- Read it one last time
- Sign it and
- Move on!

Tips

- Start writing ASAP
- Record your impressions right after the hearing
- Review the record
- Identify each issue
- Decide each issue
- Resolve all procedural and evidentiary issues

More Tips

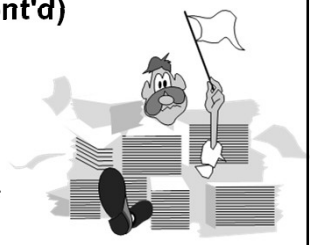
- Make sure there is evidence to support findings
- Make sure there are findings supporting the conclusions
- Make good and thorough credibility determinations
- Discuss relevant arguments made by the parties

Tips (cont'd)

- Use boilerplate for procedural discussions or common issues
- Address necessary issues the parties forgot
- Don’t ignore inconsistent or conflicting evidence

Tips (cont'd)

- Don't ignore conflicting case law
- Minimize the use of footnotes
- Use charts and tables if needed to make the decision easier to understand



Don't Get Frustrated

Know when to stop working on a decision

Suggestion

Keep an index or spreadsheet of the decisions you write.

A Few Quick Writing Tips

- Keep everything short and simple
- Avoid legalese
- Avoid LATIN!
- Avoid technical terms or else, explain them
- Avoid inflammatory language

Final Reminder

- Don't get stressed out
- There is no magic or perfect way to write decisions
- Do what's comfortable for you

Thank You!

Feel free to contact me at
jennifergeework@gmail.com
if you have any questions.